U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 20 2007
WAC 06 071 50280

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Laura Dearduff
for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The decision of the director will be withdrawn and the petition will be remanded for further action and consideration.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner seeks employment as a film director of films for a South Korean audience. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director did not address whether the petitioner qualifies as an alien of exceptional ability. Rather, the director concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel correctly notes that the director issued a decision "without a single sentence of analysis" explaining why the evidence submitted was insufficient. We find that the director's decision is insufficient given the complexities and unique issues involved in this matter. Thus, we will remand this matter for a new decision addressing the issues discussed below.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner seeks classification as an alien of exceptional ability. Despite this claim, explicitly advanced in counsel's cover letter, on May 19, 2006, the director requested evidence that the petitioner has an advanced degree. In response, counsel reiterates the claim that the petitioner is an alien of exceptional ability. The director's final decision includes no analysis or conclusion as to whether the petitioner meets the regulatory requirements for an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. Thus, we remand this matter for an analysis of the evidence under these six criteria. In this analysis, the director should take into consideration that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered."

Even if the director determines that the petitioner is an alien of exceptional ability, that classification normally requires an alien employment certification. Thus, the next issue is whether or not a waiver of the alien employment certification is warranted in the national interest. Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

The director appears to have concluded that the petitioner works in an area of substantial intrinsic merit and that the proposed benefits would be national in scope. We note that the petitioner proposes to direct films in the United States with Korean stars for release in South Korea. The petitioner asserts that these films will produce benefits that are national in scope because the petitioner will make films in different parts of the United States, promoting those areas and hiring American actors for lesser roles.

The director should carefully examine this claim using the guidance appearing in *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 217, n.3.

In addition, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

As the national interest contemplates a prospective national benefit, the director shall consider whether the petitioner, in the United States pursuant to a nonimmigrant treaty investor visa, has the intent and means to produce the proposed movies in the United States. For example, the director may wish to inquire as to whether the petitioner has a producer, funds and screenplays to make future movies. While Citizenship and Immigration Services (CIS) may waive the alien employment certification / job offer in the national interest, the visa classification is still an employment based visa classification and the waiver hinges on the alien's intent and ability to pursue the work claimed to be in the national interest. The bare, general assertion that petitioner intends to make movies cannot and does not have the same weight as documentary evidence showing that specific plans (and funding) are in place for specific projects.

Even if the petitioner is able to provide evidence of the intent and means to pursue movie directing in the United States, simply identifying a particular film project or projects will not, by itself, demonstrate eligibility for the waiver. There exists no blanket waiver for filmmakers, and therefore it cannot suffice for the petitioner simply to claim that he will benefit the United States by making movies here. Among other issues the director may choose to raise, the director shall consider whether the petitioner has a track record of success, not just as a movie director, but providing the type of national benefit he alleges will accrue from his work in the United States, promoting the areas where the movies are filmed.

Finally, it is noted that the petitioner seeks permanent residence to complete what appears to be proposed short-term or temporary projects. The director may inquire as to why nonimmigrant visa categories, such as the one that allowed the petitioner to film a previous movie in the United States, do not provide the petitioner the necessary means for completing these short-term projects.

Therefore, this matter will be remanded for consideration of whether the petitioner qualifies as an alien of exceptional ability and the national interest waiver issues discussed above. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decision is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision which, **regardless of outcome**, is to be certified to the Administrative Appeals Office for review.